

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

JOSHUA CIRWITHIAN)	
)	
Employee/Grievant,)	Docket No. 18-08-698
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,)	
DIVISION OF MANAGEMENT SERVICES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on January 17, 2019, at the Delaware Public Service Commission Hearing Room, Cannon Building, located at 861 Silver Lake Blvd., Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul Houck, Victoria D. Cairns, and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del.C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant did not appear for hearing

Kevin Slattery
Deputy Attorney General
on behalf of the DHSS, Division of
Management Services

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (the Board) on Thursday, January 17, 2019 to consider a motion to dismiss the grievance of Joshua Cirwithian (Cirwithian), against the Department of Health and Social Services, Division of Management Services (Agency).

The Grievant was employed by the Agency as a Senior Custodial Worker. By letter dated July 16, 2018 from the DHSS Secretary, Cirwithian was notified he was terminated effective immediately. This letter followed a pre-termination hearing which was convened at Cirwithian's request on July 10, 2018 (pursuant to MR 12.4 – 12.6).

Cirwithian filed a “dual” grievance to the Department of Human Resources (DHR) and the Board (pursuant to Merit Rule 12.9¹) which was received on August 9, 2018. The grievance was immediately forwarded to DHR by the MERB Administrator.

By letter dated August 21, 2018, the DHR Labor Relations and Employment Practices Administrator notified Cirwithian it declined to convene a grievance hearing, stating:

... [B]ecause Mr. Cirwithian's position is represented by an exclusive bargaining representative (American Federation of State, County and Municipal Employees Local 640), and is covered by an active collective bargaining agreement that contains a negotiated grievance procedure, that grievance procedure is the exclusive process available to Mr. Cirwithian to challenge DHSS's disciplinary action. This is a standard required by Delaware law and is confirmed in Merit Rule 1.3.²

By copy of this letter, we will inform the MERB that we do not believe there

¹ Merit Rule 12.9: Employees who have been dismissed, demoted or suspended may file an appeal directly with the Director or the MERB within 30 days of such action. Alternatively, such employees may simultaneously file directly with the DHR Secretary, who must hear the appeal within 30 days. If the employee is not satisfied with the outcome at the DHR Secretary's level, then the appeal shall continue at the MERB.

² Merit Rule 1.3: If a subject is covered in whole or in part by a collective bargaining agreement, 29 *Del.C.* §5938(d) provides that the Merit Rules shall not apply to such subject matters...Collective bargaining agreements may govern matters of bargaining unit specific pay and benefits, probation, emergency employment, transfer and promotional selection processes, reinstatement, performance records, layoff, fines, discipline up to and including dismissal, grievances, work schedules and working conditions.

is jurisdiction to maintain a Merit grievance in this matter and have declined the request to convene a Merit grievance hearing at the DHR/HRM level.³

Cirwithian advised the Board that he wished to continue his grievance and a hearing before MERB was scheduled on November 19, 2018 for January 17, 2019. The Hearing Notice was publicly posted on December 4, 2018, where it remained until the date of hearing.

Thereafter, on December 3, 2018, the Agency filed a Motion to Dismiss the grievance in which it asserts the Board lacked jurisdiction to hear it because just cause for discipline is a matter subject to the negotiated grievance procedure under the collective bargaining agreement between DHSS and AFSCME Local 640.

By letter dated December 18, 2018, Cirwithian filed his objection to the Agency's motion, noting he had "received no direction from the Union" as to how to proceed with his grievance. He also acknowledged the January hearing date and stated he intended to bring information and documentation to support his grievance.

Cirwithian did not appear at the January 17, 2019 hearing before the Board on his grievance.

CONCLUSIONS OF LAW

Merit Rule 1.3 provides:

If a subject is covered in whole or in part by a collective bargaining agreement, 29 Del. C. § 5938(d) provides that the Merit Rules shall not apply to such subject matters ... Collective bargaining agreements may govern matters of bargaining unit specific pay and benefits, probation...

Merit Rule 18.3 provides:

An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is nonnegotiable pursuant to 29 Del. C. § 5938,

³ The Board questions whether DHR/HRM violates its obligation under Merit Rule 12.9, which directs that DHR "must hear an appeal within 30 days" when it declines to convene a hearing at all. That issue, however, is not dispositive of the present matter and might be better addressed in a future case.

it shall be processed according to this Chapter.

It is undisputed that Cirwithian's position is included in the bargaining unit for which AFSCME Local 640 is the exclusive bargaining representative. The collective bargaining agreement negotiated by AFSCME Local 640 with the Agency, on behalf of bargaining unit positions, covers discipline and just cause. Consequently, Cirwithian's only recourse for grieving his termination is through that negotiated grievance procedure.

The Board concludes as a matter of law that it does not have jurisdiction to hear Cirwithian's appeal because his termination was covered in whole or in part by the Agreement.

ORDER

It is this **31st** day of **January, 2019**, by a vote of 4-0, the Decision and Order of the Board to grant the motion to dismiss and to dismiss the grievance because challenge to the Grievant's dismissal is subject to resolution through the negotiated grievance procedure contained in the collective bargaining agreement between the Grievant's employer and his exclusive bargaining representative, AFSCME Local 640. Pursuant to 29 *Del.C.* §5938, the Board is divested of jurisdiction to consider this grievance.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER